Some Thoughts on Facultative and Obligatory Mixity after Singapore and COTIF, and before CETA

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The conclusion of agreements as 'mixed', that is jointly by the European Union and its Member States, is a legal phenomenon peculiar to the EU legal order. It is a consequence of the *sui generis* nature of the Union: unlike intergovernmental organizations, the Union has been granted extensive internal and external competences by the Treaties which, in certain areas, are (or may become) exclusive. Notwithstanding the almost complete silence of the Treaties on the point, mixity quickly became common practice for the Union and was, in most instances, readily accepted by its contractual partners. That does not mean, however, that mixity has not given rise, to date, to lengthy and often heated debates within, between and before the EU institutions. The subject has also been the object of extensive study in legal scholarship.

Essentially, two main forms of mixity are distinguished: facultative mixity and obligatory mixity. Put simply, the former is generally associated with agreements which cover areas of EU's shared competences, whereas the latter is associated with agreements which include also elements falling within the Member State's exclusive competences. Two recent decisions of the Court of Justice – Opinion 2/15 relating to the Free Trade Agreement ('FTA') with Singapore, and the judgment in COTIF (Case C-600/14, *Germany v Commission*) -– deal with the above-mentioned distinction between different forms of mixity. In that regard, that case-law raised two main issues.

After the delivery of Opinion 2/15, many observers wondered whether the Court had: (i) rejected the very concept of facultative mixity, in the sense that even agreements covering (only) shared competences required mixed agreements, and (ii) regardless of the former question, found the Singapore FTA to constitute a case of obligatory mixity. These issues stemmed from both the manner in which the Court answered the questions posed by the Commission and from the wording of certain key passages of the Opinion.

To begin with, while answering in detail and with relative clarity the questions which turned on the (EU exclusive, shared, or Member States' exclusive) nature of the different sets of provisions of the FTA, the Court did not expressly address the first and more general question submitted by the Commission: 'does the Union have the requisite competence to sign and conclude *alone* the [FTA] with Singapore?' That question thus remained to some extent unanswered. Moreover, in paragraphs 225-244 of the Opinion, the Court found that since indirect foreign investment was neither a case of '*a priori*' exclusive competence (it was not covered by Article 207 TFEU), nor a case of 'supervening' exclusive competence (the requirements of

Article 3(2) TFEU were not met), that part of the agreement fell within the shared competences of the Union and '[could not] be approved by the European Union alone'. Finally, in paragraphs 285-293 of the Opinion, the Court also ruled that the part of the agreement that concerned the Investor-State Dispute Settlement ('ISDS') regime, insofar as it removed disputes from the jurisdiction of the courts of the Member States, could not be established 'without the Member States' consent'. That part of the agreement fell, according to the Court, not within the exclusive competence of the Union, but within a competence shared between the Union and the Member States.

The apparent equation made by the Court between shared competences and mixed agreements was considered surprising (and, to some extent, troubling) by many observers. It is indeed difficult to imagine, from a constitutional standpoint, why the *existence* of a concurrent external competence by the Member States on a given matter would inevitably require them to *exercise* such a competence. However, in COTIF – a judgment delivered less than six months after Opinion 2/15 – the Grand Chamber of the Court sought to clarify the issue. In paragraph 86 of the judgment, the Court stated with regard to paragraph 244 of Opinion 2/15, that it had done 'no more than acknowledge the fact that, as stated by the Council in the course of the proceedings relating to that Opinion, there was no possibility of the required majority being obtained within the Council for the Union to be able to exercise alone the external competence that it shares with the Member States in [the area of foreign indirect investment]'. In essence, the Court had never intended to suggest that the existence of shared competence necessarily implied the conclusion of a mixed agreement.

Conversely, whether the Singapore FTA is a case of obligatory mixity remains, to date, an open issue. A straightforward answer cannot be found in the Opinion: the relevant passages are particularly succinct and not without ambiguity. There seems to be a step in the Court's reasoning that is missing or, at the very least, that was made only implicitly. However, a careful reading of the Opinion may, in my view, give some hints at what the Court possibly meant to say in that regard.

Decodifying Opinion 2/15

First, in paragraph 292, the Court rejected the idea that the provisions in the FTA on the ISDS may be regarded as *ancillary*. The Court thus did not follow Advocate General Sharpston who had taken the view that the competence with regard to the provisions of the FTA on dispute settlement, including those on the ISDS regime, was 'accessory to the allocation of substantive competences' (see points 523-536 of her Opinion). Advocate General Sharpston's logic is clear: the power to regulate a field cannot be limited to that of introducing substantive rules but must necessarily encompass that of laying down rules concerning specific administrative or judicial procedures and penalties that are necessary for the enforcement of the substantive rules. However, in the case at hand the Court found that reasoning to be inapplicable: the rules on the ISDS regime are not (*rectius*, are not only) about investment, but they (also) affect another area of competence, thereby exceeding

the powers granted to the Union by Articles 63 and 207 TFEU to regulate foreign investment.

Taking that as a point of departure, the crucial issue becomes that of identifying a second area of competence that is affected by the ISDS provisions. Yet, the only explanation given by the Court to exclude the accessory nature of the ISDS regime is that such a regime has the effect of 'remov[ing] disputes from the jurisdiction of the courts of the Member States'. How should that passage be understood? An argument can be made that the Court referred to the fact the ISDS provisions may have certain effects on the Member States' judicial systems. In other words, the Court possibly found that the creation of an international judicial or quasi-judicial mechanism replacing, in some respects, or competing with Member States' domestic proceedings would be capable of altering, to an appreciable extent, the powers of the Member States to regulate their own jurisdictional systems. If that is so, the reason for which the ISDS regime cannot -– as the Court stated in the same paragraph of the Opinion – 'be established without the Member States' consent' becomes quite clear.

Indeed, the organisation and functioning of a Member State's administration, including the judiciary, is not a matter for the Union. Nowhere do the Treaties confer on the Union any competence in that field. Rather, Article 6(e) of the FEU Treaty only gives the Union the power 'to carry out actions to support, coordinate or supplement the actions of the Member States' in the area of 'administrative cooperation'. Thus, if the Union has only limited competences when Member States' administrations co-operate with each other, it may *a contrario* be deduced that the Union lacks any power to regulate the way those administrations are structured and function when acting purely internally. Accordingly, in conformity with Articles 4(1) and 5(2) TEU, that may be a field which constitutes an exclusive competence of the Member States.

A number of other provisions of the Treaties support that view: in particular, Articles 45(4) (carve-out for employment in the public service), 51 and 62 (carve-outs for the exercise of official authority) TFEU. In addition, Article 298 TFEU – which gives the EU legislature the power to establish provisions governing the '*European* administration' --– does not appear to constitute an adequate legal basis for rules which concern the *national* administrations' structures and functioning. With regard, more specifically, to national judicial systems, Article 19(1) TEU provides that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. This means that, with respect to fields not covered by EU law, Member State are not under any specific obligation in that regard (beyond, arguably, upholding the values enshrined in Article 2 TEU). That interpretation finds an echo in the works of the Convention on the Future of Europe, in which Working Group V on Complementary Competencies took the view that 'the fundamental structures and essential functions of a Member State' were among the 'core responsibilities' that Member States ought to retain.

The Member States' broad powers to regulate, at the domestic level, the administration of justice is also borne out by the Court's consistent case-law on the principle of procedural autonomy. According to that case-law, 'it is for the domestic

legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law' (see, for example, Case C-432/05, *Unibet*, paragraph 39). It may certainly be objected that the principle of procedural autonomy is not absolute, meaning that it is only valid insofar as the national rules are no less favourable than those governing similar domestic actions (principle of equivalence) and do not make it in practice impossible or excessively difficult to exercise the rights conferred on consumers by EU law (principle of effectiveness), and that it only applies in the absence of EU rules governing the matter. At closer scrutiny, however, this objection can be easily overcome. On the one hand, it is settled case-law that, even when acting in areas of their exclusive competence, Member States should nonetheless comply with EU law (see, inter alia, Cases C-203/80, *Casati*, paragraphs 27-28; and C-208/09, *Sayn-Wittgenstein*, paragraph 38). This means that, in exercising their powers, Member States cannot breach principles or provisions of EU law which may be applicable to the situation. On the other hand, the autonomy of the Member States to regulate certain areas cannot prevent the Union, when acting on the basis of competences conferred to it, from laying down common rules which may affect those areas (for example, procedures on public procurement).

The fact that, in paragraph 293 of Opinion 2/15, the Court concluded that Section B of Chapter 9 of the FTA (i.e. that concerning the ISDS mechanism) falls 'within a competence shared between the European Union and the Member States' cannot be read as contradicting the above. Indeed, not only the Member States but also the Union can be party to the disputes brought under the ISDS mechanism. Therefore, that part of the agreement impinges on the EU competences as much as on the Member States' competences. If this interpretation of Opinion 2/15 is correct, it would also explain why, in COTIF, the Court qualified its statement in paragraph 244 of Opinion 2/15, but not that in paragraph 292 thereof. The requirement of Member States' consent to the establishment of the ISDS regime would thus seem to still stand.

Awaiting Further Clarification

In conclusion, COTIF has made it clear that, in Opinion 2/15, the Court of Justice had by no means intended to reject the idea of facultative mixity. Insofar as an agreement does not include areas subject to Member States' exclusive competences, the EU may conclude it as EU-only or mixed, that choice normally falling within the political discretion of the Council. However, it is far less clear whether or not the agreement examined by the Court in the context of Opinion procedure 2/15 is a case of obligatory mixity. It is submitted a number of textual as well as contextual arguments support the view that that may actually be the case. Some further clarification on this issue may perhaps come from the procedure, currently pending before the Court, concerning certain provisions of the 2016 Comprehensive Economic and Trade Agreement ('CETA') between Canada of the one part, and the European Union and its Member States of the other. Indeed, in Opinion procedure 1/17 the Court has been asked to review the compatibility with EU law of the ISDS mechanism provided for in that agreement. Arguably, any finding

of the Court on that issue should *mutatis mutandis* be valid with regard also to the Singapore FTA. If the Opinion of the Court is unlikely to be pronounced before 2019, the Opinion of Advocate General Bot has been announced for 23 October of this year. It will certainly make for interesting reading.
